Supreme Court, U. S.
FILED
AUG 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-255

CITIZENS FOR BALANCED ENVIRONMENT AND TRANSPORTATION, INC., Successor in Interest of Committee to Stop Route 7, et al.
Petitioners

vs.

JOHN A. VOLPE, et al

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Plaintiffs (petitioners) in the above-entitled action petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit. Plaintiffs are the Citizens for Balanced Environment and Transportation, Inc., and four individuals who own land adjacent to the new Route 7 construction and are adversely affected by it.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at 503 F.2d 605 (1974) (1a).* The opinion of the

*Figures in parentheses followed by the letter "a" refer to pages in the appendix attached.

Connecticut district court is reported at 376 F. Supp. 806 (1974) (14a). A prior opinion of the district court in an earlier phase of this case not directly involved in this appeal but relevant to it is reported, *sub nom, Committee to Stop Route 7* v. *Volpe,* 346 F. Supp. 731 (Conn. 1972).

JURISDICTION

(i) The decision of the court of appeals was entered September 16, 1974.

(ii) On May 20, 1975, the court of appeals denied a petition for a rehearing and a motion to rehear in banc.

(iii) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

RELATED CASE

This case involves a controversy over construction of a portion of new U.S. Route 7 that is related to the dispute in *Coleman* v. *The Conservation Society of Southern Vermont,* No. 74-1413, in which a petition for a writ of certiorari filed by the Solicitor General on behalf of the United States is pending. *Coleman* is reported below *sub nom, Conservation Society* v. *Secretary,* 508 F.2d 927 (2nd Cir. 1974), aff'g, 362 F. Supp. 627 (Vt. 1973). Both this case and *Coleman* involve application of the National Environmental Policy Act of 1969, 42 U.S.C. 4332 (2) (C) (NEPA) to the new highway construction. The decisions of the Second Circuit in the two cases are in conflict. Certiorari should be granted in this case in order that it may be reconciled with *Coleman,* which should not be disturbed.

QUESTIONS PRESENTED

The questions presented in this case are:

(1) Whether federal highway officials are relieved of the duty of filing an environmental impact statement for construction of a federally-aided superhighway by acquiescing in the tactic resorted to by state officials of isolating a small fragment of the highway to be built and using largely state funds for the construction where

(i) the fragment was eligible for federal funding until the eve of construction;

(ii) the rest of the highway remains eligible;

(iii) federal funds were used to plan the fragment and the portions of the highway to which it is connected on either side;

(iv) the locality of the construction presents sensitive environmental problems;

(v) the fragment has no independent utility and is inextricably linked with other portions of the highway for which extensive federal funding was and is continuing to be used.

(2) Whether the majority of the court below erred in proceeding to "piecemeal decision" and deciding this case independently of *Coleman* v. *Conservation Society,* with the result that the *Coleman* bench of the Second Circuit affirmed a Vermont district court decision requiring an environmental impact statement for the entire new Route 7 corridor of 280 miles, shortly after the bench sitting on this case refused to require such a statement for a 4.7-mile fragment of the same corridor.

(3) Whether, despite the use of state funds, the federal contacts with the 4.7 miles of construction are sufficient to constitute it a federal action considering such factors as the use of federal funds and the participation of federal officials in the planning process, their approval of the location and design of the new construction, the link up of the new construction with earlier federally-funded projects, and the continuing eligibility for federal financing of the rest of the highway.

STATUTES AND REGULATIONS INVOLVED

1. Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332 (NEPA) provides in relevant part:

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to states, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

On December 2, 1974, the Department of Transportation published (39 Federal Register 41804-41821) new environmental procedures replacing Policy and Procedure Memorandum (PPM) 90-1 (37 Federal Register 21809-21816) but retaining its essential features. The new procedures state in part:

§ 771.2 Policy.

It is the policy of the Federal Highway Administration that in the development of a project a systematic interdisciplinary approach be used to assess engineering considerations and beneficial and adverse social, economic, environmental, and other effects; that efforts be made in developing projects to improve the relationship between man and his environment and to preserve the natural beauty of the countryside and natural and cultural resources; that project development involve consultation with local, State and Federal agencies, and the public; that decisions be made in the best overall public interest based upon a balanced consideration of the need for fast, safe, and efficient transportation, public services, and social economic and environmental effects, and national environmental goals.

§ 771.5 Highway section processing.

(a) A highway section should be as long as practicable to permit consideration of environmental matters on a broad scope and meaningful evaluation of alternatives. A highway section may include, when appropriate, completed as well as uncompleted portions of the highway and one or more future highway projects. Piecemealing proposed highway improvements in separate EIS's is to be avoided. The highway section identified in the EIS or negative declaration should include the total length of highway between logical termini even though only a short length of the total identified highway section is proposed for construction or reconstruction within the multiyear work program. The EIS or negative declaration should clearly identify the length or segment of the total highway section that is proposed for improvement and furnish any available information concerning long-range possibilities for future improvements within the highway section. Environmental impacts identified and discussed in the EIS will ordinarily be those anticipated to be precipitated by the proposed construction, but will also, as pertinent, include impacts associated with the total highway section. For instance, completing a gap in a highway may substantially increase traffic volumes, change traffic patterns or improve access to an area creating a need to include a discussion of impacts related to the entire highway section.

STATEMENT OF THE CASE

U.S. Route 7

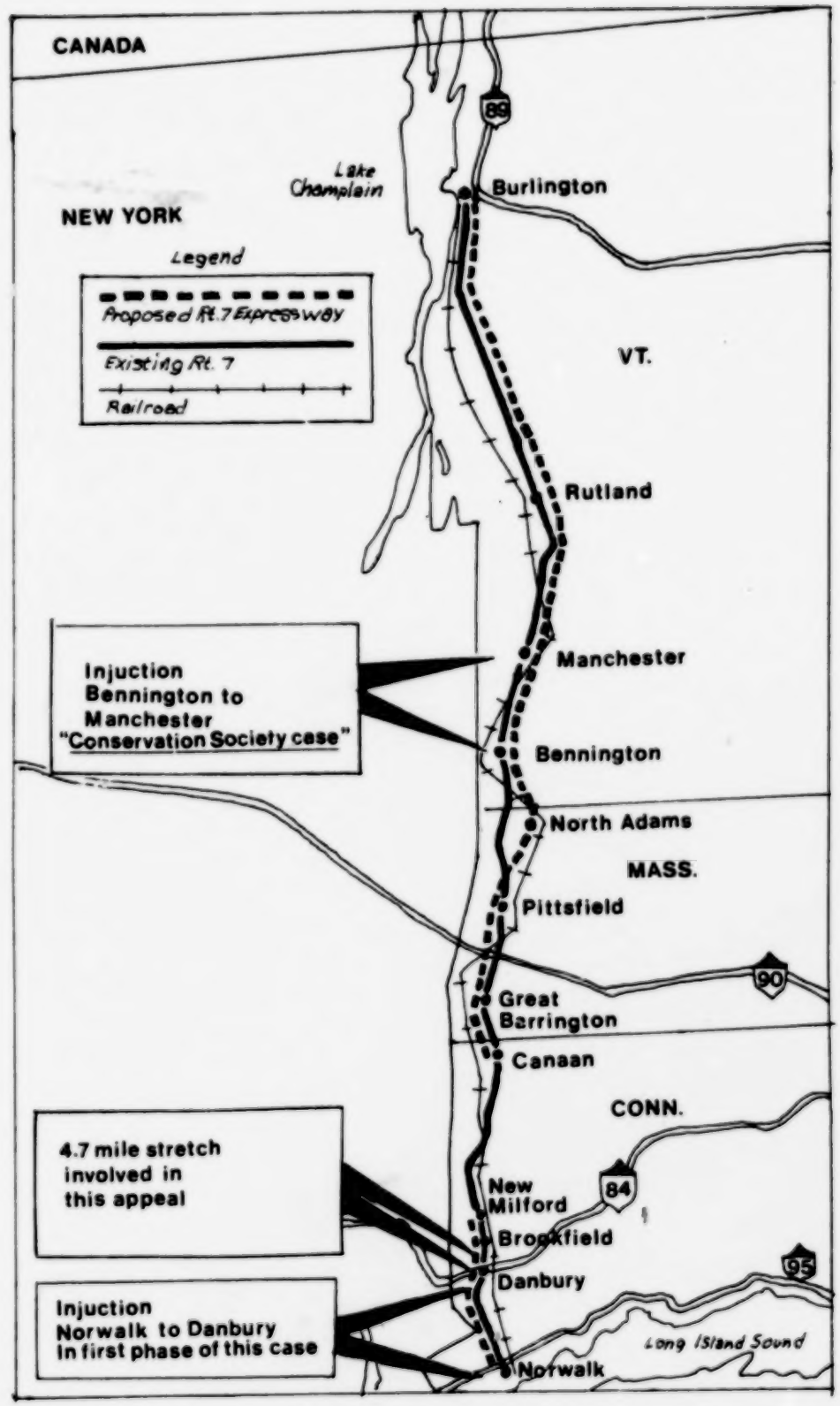
The Existing Road

Route 7 begins on the coast of Long Island Sound in Norwalk, Connecticut and runs in a northerly direction through Connecticut, Massachusetts and Vermont terminating in Burlington near the Canadian border. A map of the existing route and the proposed new superhighway to replace it appears on the opposite page.

The New Superhighway

The new Route 7 expressway is in the process of partial construction. It is a four-lane limited access superhighway. As the map demonstrates, it does not involve changes in existing Route 7, such as widening or straightening the road. A new roadbed is being bulldozed and blasted in areas substantially removed from existing Route 7, causing environmental desecration in new localities. The superhighway is being constructed as a "federal-aid primary highway," meaning that federal and state funds are available for the construction on a 50-50 basis. *Committee to Stop Route 7* v. *Volpe*, 346 F. Supp. at 734.

While defendants do not acknowledge that a "federal" plan exists for the tri-state superhighway, Circuit Court Judge Oakes, sitting by designation in the Vermont District Court to hear the related *Coleman* v. *Conservation Society* case, found that it was the "long-range" goal of highway officials from the three states (6a). He further found that federal officials were working in "partnership" with state officials, with "federal approval taking place on an ad hoc basis . . . ." (6a). The Court of Appeals for the Second Circuit affirmed Judge Oakes's holding. 508 F.2d 927 (1974). It stressed that "conversion of isolated por-



tions of Route 7 into a superhighway," (precisely what we are concerned with in this case), "will produce greater traffic, thus creating synergistic pressure for further construction to connect the newly expanded sections."

Prior Proceedings

This action was begun seeking declaratory and injunctive relief to block construction of a 31-mile span of the expressway for failure to file an environmental impact statement as required by NEPA. The proposed span extended from Norwalk to New Milford, Connecticut, as shown on the map, although it is anticipated that it may "eventually [go] on to the Massachusetts line." *Committee to Stop Route 7* v. *Volpe,* 346 F.Supp, 731, 733 (Conn. 1972). Jurisdiction was asserted on several grounds, including 28 U.S.C. 1331, which the district court found "sufficient." No challenge to plaintiff's standing was made. 346 F.Supp. at 734.

Following a hearing, Judge Jon O. Newman of the Connecticut District Court granted an injunction enjoining defendants from proceeding with construction on the section of the expressway between Norwalk and Danbury, pending the filing of an environmental impact statement. *Committee to Stop Route 7, supra.* On the map we have designated the area covered by the injunction as the "first phase" of this litigation. Defendants have not appealed the injunction.

However, shortly after the injunction issued, defendants sought an advisory opinion from Judge Newman that an environmental impact statement would not be required for construction of the expressway north of Danbury *if* only state funds were used. Judge Newman declined to rule on the question, considering the issue "not ripe for adjudication." 4 ERC 1681, 1683 (Conn. 1972) (not officially reported).

Soon thereafter, Connecticut highway officials solicited construction bids for 4.7 miles of the expressway north of Danbury. Plaintiffs promptly requested an extension of the Norwalk-to-Danbury injunction to cover this newly proposed fragment. It is shown on the map as the "4.7 mile stretch involved in this appeal."

Following a hearing, Judge Newman declined to extend the injunction, holding that the new construction was not a "federal action" subject to NEPA requirements (14a *et seq.*).

An application for a stay of construction pending appeal was denied by Judge Newman on June 12, 1974, and by the Second Circuit on June 25, 1974.

Thereafter, a majority of the Second Circuit, in a *per curiam* opinion (1a *et seq.*), affirmed Judge Newman's ruling denying the injunction. Judge Harrison L. Winter of the Fourth Circuit, sitting by designation, filed a dissent sharply critical of the majority both on the merits of the ruling and on the manner in which the appeal was handled procedurally (3a *et seq.*). He noted the obvious conflict between Judge Newman's decision and the ruling of Judge Oakes in *Conservation Society of Southern Vermont* v. *Secretary,* 362 F.Supp. 627 (D.Vt. 1973). Judge Oakes had required an environmental impact statement for the entire Route 7 corridor from Norwalk, Connecticut to Burlington, Vermont. This included the 4.7 miles of expressway from Danbury to Brookfield for which Judge Newman held an impact statement is not required and construction is proceeding. Judge Oakes also enjoined construction between Bennington and Manchester, Vermont, as shown on the map.

An appeal was pending from Judge Oakes's decision at the time this case was before the Second Circuit, and Judge Winter urged that both cases be heard together by a single bench. The majority rejected his recommendation,

holding that Judge Newman's finding that an impact statement was not required for a "specific" portion of the expressway was not overridden by Judge Oakes's "general" requirement of a statement for the entire expressway. Subsequently, the inconsistent results that Judge Winter feared became a reality when another bench of the Second Circuit affirmed Judge Oakes's decision. *Conservation Society v. Secretary*, 508 F.2d 927 (1974).

The court sought to account for the contradictory rulings in a footnote, stating that "Judge Newman's specific finding does not preclude, and is unaffected by, Judge Oakes's general findings" 508 F.2d at n. 43a. This does not reconcile the contradiction. The impact statement required by Judge Oakes includes the portion of the expressway on which construction is proceeding under Judge Newman's decision. If not promptly enjoined, the construction will render academic any findings that may be contained in the impact statement that the particular portion of the road being built is causing severe environmental damage that could and should have been avoided. The fact is, as Judge Winter observed, defendants have conceded that the 4.7 miles of construction would have a "'major' and 'significant' impact upon the environment" (4a).

On the merits of this controversy, Judge Winter would have required an environmental impact statement for all proposed construction north of Danbury, including the 4.7 miles in progress. To begin with, he found unsupportable in the "historical" and "physical context of the existing and proposed relocated Route 7," Judge Newman's conclusion, affirmed by the majority, that the portion of highway construction in issue did not involve federal action for the purposes of NEPA (5a-6a). He pointed out that in the earlier decision on the first phase of this case, Judge Newman found that state and federal highway officials planned to construct a unitary "31-mile, four-lane limited access expressway . . . from Norwalk to New Milford," and eventually on to Massachusetts (7a). The construction was to be done with "50-50 federal funding." State highway officials anticipated using some $25 million in federal dollars allocated for "selected segments of the expressway" (7a).

In addition, extensive federal financing has already been used for construction completed elsewhere on the expressway. This includes, without exhausting the list, the building of interchanges and spurs in Norwalk and Danbury to link up with other interstate highways (346 F.Supp. at 734). Judge Newman further found that "approximately 40 million of federal funds" was used for the Danbury link up alone (16a). Fifty thousand dollars in federal money was used just to plan the 4.7 mile span in issue on this appeal (8a). Judge Winter considered the use of planning funds of particular importance in "triggering" application of NEPA (8a). In addition, the southern end of the 4.7 mile span is attached to a federally-funded bridge costing $465,000. Cars crossing the "federal" bridge in either direction will have to travel at least one mile on the allegedly state-funded span, because the first exit on the span is a mile north of the bridge (9a, 16a).

The transcript of the hearing before Judge Newman on plaintiff's application to extend the Norwalk to Danbury injunction to the present construction graphically underscores Judge Winter's misgiving that the claim that state funds exclusively are being used for the present construction involves bookkeeping sleight-of-hand in which federal funds that could have been used are "shifted" to construction elsewhere in the expressway "where compliance with NEPA will be less onerous" (8a). Connecticut's top highway official confirmed in his testimony before Judge Newman that it was the state's practice to use up all federal funds available for highway construction (Tr. 208)*

* All transcript references in this petition are to the transcript of the proceedings before Judge Newman on January 29 and 30, 1974 to extend the Norwalk to Danbury injunction. Documents Nos. 10 and 11 in the record on appeal to the Court of Appeals.

To insure that this is done, the state qualifies all highway projects for federal funding. Since there is never enough federal money to do all that the state wishes to do, if for any reason federal dollars slated for a project are not used, they can always be applied elsewhere (Tr. 207-8). "We try to assure ourselves," said the official, "that we will always have sufficient federal-aid projects to use whatever moneys might be available." (Tr. 208).

If fund shifting is sanctioned as a tactic to escape NEPA obligations, the most sensitive environmental problems will be denied a public airing. The circuit courts, as we will show, are in direct conflict on the issue of whether unilateral decisions by state officials to maneuver transferable funds can immunize federal officials from NEPA compliance. Significantly, as Judge Newman noted in his opinion, federal officials declined, despite his invitation, to take a position on the issue and would only state that "this is a matter for the Court's decision" (24a). The federal government did not participate in the appeal.

With the same forcefulness with which he exposed the financial juggling used to circumvent NEPA, Judge Winter condemned the manner in which construction of the expressway was fractured to permit pinpointing of state funding on isolated segments in an attempt to bolster the claim of no federal action. The 4.7 miles at issue in this case is only a very small part of what he correctly described as a "grander, more comprehensive plan — a complete relocation of existing Route 7, at least from the Connecticut Turnpike to New Milford, Connecticut, if not to Burlington, Vermont" (10a).

Neither the majority of the Court of Appeals nor Judge Newman made any finding that the 4.7-mile Danbury-to-Brookfield leg of the expressway has any independent utility so as to justify its isolation for NEPA purposes. Judge Newman did find that the 14.4-mile stretch from Danbury to New Milford did have "independent justification" (25a). While petitioners dispute the correctness of the ruling, on this appeal the issue before this court, as before the lower courts, concerns only the 4.7-mile Danbury-to-Brookfield stretch where construction has begun. Judge Newman's opinion frequently reads as if the State of Connecticut has renounced the use of federal funds for any part of the 14.4 miles between Danbury and New Milford (see, e.g., 15a). The record shows, however, as Judge Newman himself acknowledged elsewhere, that the state has not done so (19a). The senior federal official for federal highway administration in Connecticut confirmed in his testimony that the only condition that remains to be satisfied to permit use of federal dollars for the Brookfield-to-New Milford portion of the expressway is compliance with NEPA (Tr. 48-50).

Uncontradicted testimony of an expert witness called by plaintiffs established that the 4.7 miles of construction presently under way has no "independent utility" (Tr. 123). No contrary finding was made by Judge Newman or the Court of Appeals. The project can fairly be characterized as a legalistic ruse to avoid NEPA.

REASONS FOR GRANTING THE WRIT

1.

THE CIRCUIT COURTS ARE IN CONFLICT AND THE CASE LAW AS TO WHEN NEPA APPLIES TO HIGHWAY CONSTRUCTION IS UNSETTLED

NEPA "makes environmental protection a part of the mandate of every federal agency and department." The duties imposed by NEPA are not "inherently flexible." They "must be complied with to the fullest extent, unless

there is a clear conflict of *statutory* authority." *Calvert Cliffs Coord. Com.* v. *United States A. E. Com'n.*, 449 F.2d 1109, 1112, 1115 (D.C. Cir. 1971).

A review of recent federal court decisions involving application of NEPA requirements to federally-funded highway construction reveals a hopeless quagmire. The Second Circuit's decision in this case conflicts with holdings in the Fourth, Fifth, Eighth and Ninth Circuits, among others, as the following cases show:

La Raza Unida v. *Volpe*, 337 F.Supp. 221, aff'd, 488 F.2d 559, 562 (9th Cir. 1975), *cert. den.*, 417 U.S. 968 *cf., Lathan* v. *Volpe*, 455 F.2d 1111(9th Cir. 1971)

Named Individual Members of the San Antonio Conservation Society v. *Texas Hy. Dpt.*, 446 F.2d 1013 5th Cir. 1971)

Indian Lookout Alliance v. *Volpe*, 484 F.2d 11 (8th Cir. 1974)

James River v. *Richmond Metropolitan Authority*, 359 F.Supp. 611, 628, 632, aff'd, 481 F.2d 1280 (4th Cir. 1974)

The Second Circuit also, of course, is in conflict with itself, as this case and *Coleman* v. *Conservation Society* demonstrate. For still another view of the problem, see: *City of Boston* v. *Volpe*, 464 F.2d 254 (1st Cir. 1971). Federal and state highway officials and concerned citizens and environmentalists are without guidelines or clarity to measure the propriety of official behavior. The Solicitor General in his petition for a writ of certiorari in *Coleman* v. *Conservation Society* (No. 74-1413), confirmed that circuit court decisions have "introduced considerable uncertainty into this process" of "attempting to comply with NEPA" (at pp. 11-12 of Petition of Solicitor General).

The unsettled state of the law is leading courts and litigants to resort to cant and legalisms to justify *ad hoc* behavior. In the present case, carefully orchestrated bookkeeping maneuvers were resorted to on the eve of construction to arrange exclusively state funding for a 4.7-mile span. The district court treated the problem as a trace-the-federal-dollars issue. It declined to allow "solicitude for the environment" to deter it from its course (22a). It was unconcerned that NEPA mandated such solicitude.

The Second Circuit affirmed, finding the state-dollars-only claim a sufficient basis for exempting the project from NEPA requirements. In contrast, in *Coleman* v. *Conservation Society*, the Second Circuit upheld a district court order requiring an environmental impact statement for 280 miles of superhighway (most of it as yet unscheduled for construction), based on the finding that state and federal highway officials were working in unison toward that long range goal, but without a specific plan or time frame.

The present case provides an ideal opportunity for this Court to bring some order to the confusion and to assist the lower courts in future highway litigation over environmental matters.

2.

THE STATUTORY SCHEME FOR FEDERALLY-AIDED HIGHWAYS

Most of the problems encountered in the cases stem from the statutory scheme of the Federal-Aid Highways Act, 23 USC 101 *et seq.* Under the Act, federally-aided highway construction involves a series of successive stages. Federal approval is required as state officials complete each stage. However, approval at any stage prior to the start of construction neither obligates the federal government to fund a project nor commits the state to using federal funds.

A number of circuit court opinions have described in some detail the process of federal-state interaction in highway construction. See, e.g.: *Lathan* v. *Volpe*, 455 F.2d 1111 (9th Cir. 1971); *La Raza Unida* v. *Volpe*, 337 F.Supp. 222, aff'd, 488 F.2d 559, *cert. den.*, 417 U.S. 968 (1975). The courts are generally in agreement that NEPA would not apply to a highway built solely with state funds and without federal involvement otherwise. They are also in agreement that NEPA is unquestionably applicable where "federal funds have been approved or are immediately sought." *La Raza Unida* v. *Volpe, supra*, 337 F.Supp. at 226.

The problem arises because both state and federal funds are used in most highway construction. New highways are built in sections, and each section is designated a "project." *Lathan* v. *Volpe, supra*, 455 F.2d at 1115. There are numerous opportunities for a state to manipulate funding by allocating federal money to one project on a highway and not to another.

Some six to eight years usually intervene between the planning of a highway "project" and its construction. The projects are expensive, and states make sure to keep their options open for using federal money by securing federal approval at each successive stage.

There are five stages in all. The first is "systems approval" in which a "vague corridor" for the highway is established. The second is "location approval" in which a precise route within the corridor is layed out. This is followed, in order, by "design approval," "plans, specifications and estimates approval," and, finally, "construction approval." *La Raza Unida* v. *Volpe*, 337 F.Supp. at 224. See also: *Lathan* v. *Volpe*, 455 F.2d at 1115-6.

Several circuits have adopted the standard that NEPA and other federal statutes and regulations apply when the state obtains "location approval." The stated justification for this is that "the state should not have the considerable

benefits that accompany an option to obtain federal funds" without having to assume "attendant [federal] obligations." Projects that seek "possible protection and assistance of the federal government must fall within the statutes and regulations." *La Raza Unida* v. *Volpe*, 337 F.Supp. at 227.

In affirming the district court's decision in *La Raza Unida*, the ninth circuit stated that it would not approve an interpretation of the controlling statutes that would require compliance with NEPA and other protective laws only if federal funds were actually "made available to the project." The court explained that under such an interpretation, a state agency could routinely obtain program approval for a greater number of projects than could be funded by the federal dollars available. Then the state could seek "actual funding" for "only those projects with respect to which compliance proved to be relatively easy and inexpensive." 488 F.2d at 562.

The first, and eighth circuits have declared themselves to be in accord with the *La Raza* holding. *City of Boston* v. *Volpe*, 464 F.2d 254 (1st Cir. 1971); *Indian Lookout Alliance* v. *Volpe*, 384 F.2d 11, 16-17 (8th Cir. 1974). The Fourth circuit affirmed, *per curiam*, a district court opinion that expressed accord with *La Raza*. *James River* v. *Richmond Metropolitan Authority*, 359 F.Supp. 611, 633, aff'd, 481 F.2d 1280 (4th Cir. 1974). A Fifth Circuit decision that preceded *La Raza* in time is in harmony. *Named Individual Members of San Antonio Conservation Society* v. *Texas Hy. Dept.*, 446 F.2d 1013 (5th Cir. 1971).

In the present case, the portion of the highway from Danbury to Brookfield that is the immediate focus of the dispute had already received federal "design approval" which is a stage beyond location approval. While technically the label "route revision approval" appears to have been used instead of "location approval," Judge Newman

found that the state's submission to federal authorities for route revision approval was not only "sufficient to constitute location approval," but more detailed than that required to obtain it (21a). Further, the state could not have obtained the later-stage design approval without first having obtained location approval (21a).

Finally, it should be noted that the Second Circuit's holding in *Coleman* v. *Conservation Society* goes beyond the location approval standard of *La Raza*, and we believe properly so. It requires an overall environmental assessment of the long range goals of tri-state highway officials for the 280-mile expressway. Plainly, if the mandate of NEPA is to be taken seriously, the time to assess the environmental impact of such a project is before construction begins on scattered segments and creates inexorable pressures for completion of the entire expressway.

The need is pressing and the time is appropriate for this Court to address itself to the discordant positions expressed by the circuits on the environmental considerations in federal funding of highways.

3.

THE SEGMENTATION ISSUE

Segmentation of highway projects is simply another way of looking at funding manipulation by state highway officials to avoid NEPA requirements. If a state will use its own money to circumvent difficult environmental issues, then it follows that the size of projects will be tailored to fit state budgets allocated for the projects. To preserve the vitality of NEPA, circuit courts have recognized that limits may properly be imposed on the fragmentation of highway construction.

The regulations of the U. S. Department of Transportation applicable to environmental procedures furnish support for judicial oversight of the problem. Section 771.5 of the regulations, 39 Fed. Reg. 41806, quoted *supra* p. 6, provides that a "highway section should be as long as practicable to permit consideration of environmental matters on a broad scope and meaningful evaluation of alternatives."

In their efforts to devise a test for determining "practicable" length for assessing "environmental matters on a broad scope," the lower courts have resorted to verbal formulations such as does the highway segment proposed have an "independent utility of its own" *Indian Lookout Alliance* v. *Volpe*, 484 F.2d 11, 19 (8th Cir. 1973). Judge Newman, as we have shown, resorted to the formula for the 14.4-mile section, Danbury to New Milford, but not for the 4.7-mile Danbury-to-Brookfield stretch. Another version of the same formula is does a project begin and end at "logical termini." *Indian Lookout Alliance* v. *Volpe, supra.*

These verbalizations are hardly satisfactory. At best, they are molded to practicalities of construction and not meaningful assessments of environmental damage. Moreover, in their ambiguity they invite litigation. One court's logical terminus can be another's barren landscape. In *Indian Lookout Alliance* v. *Volpe, supra,* the Eighth Circuit acknowledged that "it will only be through a series of interpretations under varying and contrasting factual situations" [meaning lawsuits] "that a better and more precise standard can be conceptualized and articulated." In that case, the court added 22 miles to an original 14-mile segment highway officials had proposed for environmental evaluation.

The burgeoning field of highway environmental litigation urgently requires analysis and clarification from this Court of the problems confronting the lower courts and the solutions being devised.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A:
Opinion Below — Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1730

CITIZENS FOR BALANCED ENVIRONMENT AND TRANSPORTATION, INC.,
Successor in interest of Committee to Stop Route 7, et al.,
Plaintiffs-Appellants,

—against—

JOHN A. VOLPE, et al.,
Defendants-Appellees.

Before:

MULLIGAN and WINTER,* *Circuit Judges*
and POLLACK, *District Judge.***

Appeal from order entered in the United States District Court for the District of Connecticut, Jon O. Newman, *Judge*, which denied motion seeking to enjoin construction of segment of highway until environmental impact statement prepared.

Affirmed.

PER CURIAM:

This is an appeal from an order which denied a motion seeking to enjoin the construction of the segment of Route 7 north from Danbury to New Milford, Connecticut until an environmental impact statement (EIS) has been filed in accordance with the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C). The order is affirmed on the opinion of Judge Newman below.*** —— F. Supp. ——, Civ. No. 15,054 (D. Conn. May 10, 1974).

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* Of the Fourth Circuit Court of Appeals, sitting by designation.
** Of the United States District Court for the Southern District of New York, sitting by designation.
*** A permanent injunction preventing construction of Route 7 south from Danbury to Norwalk, Connecticut, until an EIS was prepared.

In *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transp.*, 362 F. Supp. 627 (D. Vt. 1973), appeal docketed, No. 73-2629 (2d Cir. 1973), Judge Oakes held that the EIS prepared by the defendant Secretary of Transportation covering the Bennington to Manchester, Vermont segment of Route 7 was insufficient and barred construction of that portion until an EIS for the entire Route 7 corridor from Burlington, Vermont to Norwalk, Connecticut had been prepared. In his opinion, Judge Oakes made a general finding that federal highway officials have knowledge of the overall planning process by the state officials and that the states have taken advantage of federal highway planning money in connection with Route 7 improvement. 362 F. Supp. at 636. He further found "that there is no overall federal plan for improvement of the Route 7 corridor in the three states into a divided limited access superhighway." Id.

The question before Judge Newman was whether or not the construction of the segment of Route 7 between Danbury and New Milford constituted "federal action" within the meaning of 42 U.S.C. §4332(2)(C). In a thorough opinion, he concluded that this portion of Route 7 was not to be deemed "federal action" since only state funds are to be used in its construction, and that therefore no EIS was required.

Judge Newman was fully aware of Judge Oakes' opinion in *Conservation Society*. Since the segment in Connecticut was specifically before the Connecticut District Court and not before the Vermont District Court (the State of Connecticut was not a party and did not appear in that action), we are not persuaded that Judge Oakes' general findings override the specific finding below that no federal action

was issued by Judge Newman in *Committee to Stop Route 7* v. *Volpe*, 346 F. Supp. 731 (D. Conn. 1972).

was present. Thus we agree with Judge Newman that no EIS for this portion of Route 7 (Danbury to New Milford) is necessary prior to the construction of this challenged project.

The order below is affirmed.

WINTER, *Circuit Judge*, dissenting:

Because of the interrelation of this case with the appeal pending in *Conservation Society* v. *Secretary*, 362 F.S. 627 (D. Vt. 1973), I think it unwise to decide this case until Conservation Society has been heard and the two can be decided together. But even if we proceed to piecemeal decision, with the attendant risk of inconsistent conclusions and the possible need for further hearing, I cannot agree that Connecticut should be excused from compliance with the National Environmental Policy Act, 42 U.S.C. § 4332 [NEPA], in the construction of the 4.7 mile segment of new or relocated Route 7, which is the subject of the litigation before us. I respectfully dissent and set forth the reasons for my disagreement.

I.

The instant case arose when plaintiffs, whose predecessors in interest were successful in requiring Connecticut to comply with NEPA in the construction of new or relocated Route 7 between Norwalk and Danbury, south of Danbury, *Committee to Stop Route 7* v. *Volpe*, 346 F.S. 731 (D. Conn. 1972), sought similar relief with respect to all or any part of the construction of Route 7 *north* of Danbury, and particularly with respect to the construction of the 4.7 mile segment running north from Danbury to Brookfield, Connecticut, currently under construction. It

is conceded that the proposed construction, which is proceeding apace because both the district court and this court denied permanent and interim relief, has a "major" and "significant" impact upon the environment. The only issue is whether the construction of the segment is "Federal action" within the meaning of NEPA.

II.

Later, I will deal more fully with the findings in *Conservation Society* v. *Secretary*, supra, but for present purposes it suffices to say that Circuit Judge Oakes, sitting by designation, found that the proposed improvement of the Route 7 corridor from Norwalk, Connecticut, to Burlington, Vermont, was sufficiently an overall project involving federal action that he required, as a condition to the construction of a two-lane segment between Bennington and Manchester, the preparation of an environmental impact statement (EIS) "in respect to the entire Route 7 corridor . . .," 362 F.S. at 638. Manifestly, this order is inconsistent with Judge Newman's order in the instant case that an EIS is not necessary for the Danbury-Brookfield segment.

Although Judge Newman demonstrated that he knew that *Conservation Society* had been decided, he made no effort to reconcile his decision with that of Judge Oakes. The majority makes none either, except to resort to the rule of thumb of statutory construction that the specific prevails over the general—a rule which may or may not be applicable here--and to call attention to the fact that Connecticut was not a party in *Conservation Society*. However, the National Environmental Policy Act imposes the duty of preparing an adequate environmental impact statement on federal officials, see *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2 Cir.), *cert. denied*, 409

U.S. 849 (1972), and from the official report of *Conservation Society* it appears that the plaintiffs in the instant case, Citizens for Balanced Transportation and Environment, Inc., were also plaintiffs in *Conservation Society*, where they obtained a favorable judgment against the Secretary of Transportation, *defendant in both cases*, that an adequate environmental impact statement would have to cover the entire Route 7 corridor, including the Danbury to Brookfield segment.

One who sits by designation in a sister circuit should avoid appearing to be an ungrateful guest, but I must nevertheless give voice to dissatisfaction with the majority's refusal to have these cases heard and decided together by this or another panel of the court. Absent an appellate decision overturning *Conservation Society* in whole or in part, I must treat it as a presumptively correct decision. Both it and the instant case cannot be reconciled on the single record before us. Under the practice of this circuit, if the decision in this case is at variance with what may ultimately be decided in *Conservation Society*, resolution may come about only after rehearing or rehearing in banc. In these days of crushing caseloads, the majority should recognize that judicial efficiency is achieved by avoiding duplicate hearings. We ought to do what is to me the obvious—advance *Conservation Society*, hear and decide it, or order the instant case reheard and decided by the panel to which *Conservation Society* is or will be assigned.

III.

If we proceed to decision in the instant case, I cannot agree that NEPA should be held inapplicable. Essentially, I reach that conclusion from viewing the Danbury-Brookfield segment in its historical context and in its physical

context as a part of the existing and proposed relocated Route 7, and from considering the extent to which federal funds have been expended in the planning and construction of the segment and its continuations.

In *Conservation Society*, which at the time of decision of the instant case stands unreversed, Judge Oakes found that while "there is no overall federal plan for improvement of the Route 7 corridor in the three states [Vermont, Massachusetts and Connecticut] into a divided limited access superhighway," 362 F.S. at 636, nevertheless:

> The court finds, however, that each of three states' highway departments are looking toward this end as possible of accomplishment with legislative and federal approval over a long-range period of time, with federal approval taking place on an ad hoc basis at the division engineer level. The court finds, moreover, on the basis of the testimony of Mr. Morris that the construction of isolated sections along the corridor will induce traffic, tending further to require additional construction beyond presently planned termini. The court further finds that federal highway officials have knowledge of the overall planning process by state officials and to a considerable extent work in "partnership" with state officials in connection therewith, and that each of the three states has from time to time taken advantage of federal highway planning money specifically in connection with Route 7 improvement. (Footnote eliminated.) 362 F.S. at 636.

Judge Oakes' findings largely confirm what Judge Newman found in earlier proceedings in the instant case when he concluded that the Norwalk-Danbury segment could not be constructed until Connecticut and federal officials brought themselves into compliance with NEPA. *Committee to Stop Route 7*, supra. There, Judge Newman described the road as "a 31-mile, four-lane limited access expressway to replace U. S. Route 7 from Norwalk to New Milford, and perhaps eventually on to the Massachusetts line." 346 F.S. at 733. He found:

> The state has authorized bonds for the expressway and undertaken extensive planning for it. The expressway will qualify for 50-50 federal funding as part of the system of primary routes, including such routes within urban areas. The state expects to use some $25,000,000 of its apportionment of federal funds on selected segments of the expressway. Federal funds have already been used for one segment in Norwalk and to construct interchanges on Interstate 84 in Danbury, an east-west highway, to which relocated Route 7, if built, will link up from the south just west of Danbury, and from which it will continue north from a point just east of Danbury. 346 F.S. at 734.

It would thus seem clear from the findings of Judges Oakes and Newman that the Danbury-Brookfield segment in suit is only part of a very much larger overall project contemplated to be built in large part by the use of federal funds. Connecticut eschewed use of the federal funds to which it would have been entitled in letting contracts for the Danbury-Brookfield segment. It did so only after (a) Judge Newman required an EIS in *Committee to Stop Route 7* for the Norwalk-Danbury segment, and (b) Connecticut unsuccessfully sought an advisory opinion from Judge Newman of its obligations vis-a-vis NEPA in regard to the Danbury-Brookfield segment before deciding how to finance its construction. Prior to then, Connecticut had considered using anticipated federal funds of $28.4 million for the overall construction of new Route 7 from Norwalk to New Milford, and some were used in construct-

ing the segment from Norwalk to Danbury. While it has used none in letting contracts for the Danbury-Brookfield segment, it is not disputed that Connecticut has followed all procedural steps, except compliance with NEPA, to maintain its eligibility for federal funds for the entire Danbury-New Milford segment. The inference seems inescapable that at some future date it may be found that Connecticut's disavowal of federal funds for building the Danbury-Brookfield segment is no more than a bookkeeping entry shifting federal funds which might have been used for the Danbury-Brookfield segment to other portions of new Route 7 or to other projects where compliance with NEPA will be less onerous.

It is undisputed that approximately $50,000 of federal funds was spent in planning the segment in suit. Admittedly, this is little compared to the estimated cost of construction of $38,000,000. Still, the question is not whether the expenditure of $50,000 of planning dollars had a significant effect on the federal *highway trust fund*, but rather whether the expenditures "significantly affect[ed] the quality of the human *environment*." 42 U.S.C.A. § 4332(c) (emphasis supplied). "[T]he Department of Transportation has determined that any action significantly affecting the environment is major. DOT Order 5610.1, Definitional Guidelines (2). . . ." *Monroe County Conservation Council, Inc.* v. *Volpe*, 472 F.2d 693, 698 (2 Cir. 1972). The planning stage is the point at which it makes the most sense to impose NEPA's requirement of consideration of alternatives. It will frustrate the Congressional purpose behind NEPA and will occasion unnecessary and costly delays if we hold that a *relatively* small initial expenditure of federal planning funds does not trigger NEPA, but that the subsequent expenditure of federal construction funds does.

The Brookfield-Danbury segment is inextricably tied into other roads on which vaster federal expenditures have been made. The southern terminus of the segment is connected, without exit, to an existing federally-funded bridge; and this in turn is connected, again without exit, to I-84, a federally-funded interstate highway. As found by Judge Newman:

> cars travelling north from Danbury on new Route 7 will cross the federally-funded bridge and remain on the state-funded portion of new Route 7 for about one mile until the first exit is reached. Similarly, cars coming south toward Danbury on new Route 7, after passing an exit one mile north of the bridge, will have to cross the bridge and continue into I-84. . . . —— F.S. at ——.

Thus, the physical connection between the segment and construction which is unquestionably "Federal action" is demonstrated. To belittle this fact, Connecticut disingenuously asserts that the state-financed segment simply connects I-84 to new Route 7. Equally, it seems to me to connect new Route 7 to I-84. *The fact is that one cannot use the southern portion of the segment in question without using a bridge and spur constructed with federal money.*

IV.

Were this a case in which the Danbury-Brookfield segment was a middle section of an overall federally-financed road, the case would be clearly one of impermissible segmentation and easily decided. Under such circumstances, the authorities are in accord that Connecticut would be required to comply with NEPA with regard to that segment. Named *Ind. Mem. of San Antonio Con. Soc.* v. *Texas*

Hy. Dept., 446 F.2d 1013 (5 Cir. 1971); *Thompson* v. *Fugate*, 347 F.S. 120 (E.D. Va. 1972). The case is, of course, not that clear, because the portion of Route 7 north of Brookfield has yet to be built and a final decision as to how to finance that construction has yet to be made. Still, there are striking similarities to a true segmentation case, and I have no doubt that we ought to conclude that NEPA applies.

The findings of Judge Oakes and of Judge Newman make certain that construction of the segment in suit is only part of a grander, more comprehensive plan—a complete relocation of existing Route 7, at least from the Connecticut Turnpike to New Milford, Connecticut, if not to Burlington, Vermont. For the Connecticut portion, if not for the entire project, federal financing has been contemplated and federal financing has been employed. Connecticut has been assiduous in preserving its eligibility for federal financing. I agree that the latter would probably not be a sufficient basis to make NEPA applicable, but in this case there is more. Federal funds have already been used to construct the Norwalk-Danbury segment, and the Danbury-Brookfield segment is so designed and will be so built that it will be a mere continuation of what the federal government has already financed. Moreover, some federal funds have been spent in the design of the Danbury-Brookfield segment. These factors make applicable the principles of *La Raza Unida* v. *Volpe*, 337 F.S. 221 (N.D. Cal. 1971), even though construction of the Danbury-Brookfield segment is not federally financed. They serve also to distinguish the holding in *James River & Kanawha Canal Parks, Inc.* v. *Richmond*, 357 F.S. 611 (E.D. Va. 1973); aff'd 481 F.2d 1280 (4 Cir. 1973) (per curiam) because of the clear evidence of federal action.

This is not a case where there is a clean physical break, or clear escape hatch for the travelling public, between an existing federally-financed project and one to be built by state funds. A traveller on one *must* use the other. The two do not merely "connect," as the district court treated them; each is a physical extension of the other. This is not a case, either, where Connecticut has committed itself to exclusively state financing of the continuation of the Danbury-Brookfield segment when inevitably it will be built. There is every indication that federal financing will again be resorted to in successive construction where compliance with NEPA will not be burdensome. Manifestly, if the grand design of NEPA, so elegantly articulated in *Calvert Cliffs Coord. Comm.* v. *United States A. E. Com'n*, 449 F.2d 1109 (D.C. Cir. 1971), is to be preserved, the Act must be complied with now.

It matters not that the entire Danbury-New Milford segment, of which the Danbury-Brookfield segment is a part, has a useful purpose to serve the two communities, aside from its function as a continuation of new Route 7 and a continuation of other federally-funded facilities. *Sierra Club* v. *Froehlke*, 359 F.S. 1289, 1324-5 (S.D. Tex. 1973); *Conservation Society*, supra. And this is true even if one agrees that a four-lane, limited access highway is needed to connect a city of 53,300 with another of 15,400. To conclude otherwise would destroy the overall purpose of NEPA. It is too common an experience not to recognize that there is some local use on every limited access highway, even those admittedly built as a result of major federal action. We ought not to permit this concurrent purpose to obscure the function of the Danbury-Brookfield segment as a necessary link in the overall relocated Route 7—a project treated by Connecticut as a single project (until it experienced the impact of compliance with NEPA in

construction of the first segment) and initially undertaken with the use of federal funds.

With commendable candor, Judge Newman characterized the question of whether the cumulative effect of the various factors which I have discussed amounts to federal action as "close." Even if the facts as I have analyzed them do not mount up to a conclusive showing of "Federal action," Judge Newman's characterization serves to decide the case. This is so because § 102(1) of the National Environmental Policy Act, 42 U.S.C.A. § 4332, sets forth the rule of decision for close cases:

> The Congress authorizes and directs that, *to the fullest extent possible:* (1) the policies, regulations, and *public laws* of the United States shall be *interpreted* and administered in accordance with the policies set forth in this Act. (Emphasis added.)

This Congressional directive to "interpret" the "laws" of the United States "in accordance with the policies" of NEPA "to the fullest extent possible" is not contained in the legislative history of the Act; it is part of the very statute itself. The question of whether the Danbury-New Milford segment is federal action may be a close one, but the application of NEPA depends on its resolution. In the immediate case, to give any effect to the policies of NEPA, much less to implement them to the "fullest extent possible," it is necessary to interpret NEPA to cover a controversy presenting a close question of "Federal" action.

While it might be argued that § 102(1), 42 U.S.C.A. § 4332(1), was directed at statutes other than NEPA, I would have little difficulty in holding that if all other federal statutes must be interpreted in accordance with the policies of NEPA to the fullest extent possible, NEPA itself should be interpreted in accordance with its statutory

policies to the fullest extent possible. In any event, this circuit has already interpreted the command of § 102(1), 42 U.S.C.A. § 4332(1), as applicable to NEPA itself. In *Monroe County Conservation Council* v. *Volpe*, 472 F.2d 693, 699 (2 Cir. 1972), the court stated:

> Congress directed that NEPA, which provided for an impact statement, was to be implemented to "the fullest extent possible," 42 U.S.C. § 4332.

In sum, in a close case where the impact of a project concededly has a "significant" impact on the environment and is admittedly a "major" undertaking, if, as in this case, the application of NEPA turns on a close question as to whether the project is "Federal," I think that § 102(1)'s direction to interpret the law in accordance with the Act's environmental policies to the fullest extent possible provides the rule of decision for the case and requires a holding that the project is "Federal."

I would reverse the district court and direct that permanent relief be granted on remand. I would have granted interim relief at the time of argument.

APPENDIX B:

Opinion Below — District Court, District of Connecticut

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CITIZENS FOR BALANCED ENVIRONMENT AND TRANSPORTATION, INC., successor in interest of Committee to Stop Route 7, et al	:	
V.	:	CIVIL NO. 15,054
JOHN A. VOLPE, ET AL	:	

MEMORANDUM OF DECISION
ON PLAINTIFFS' MOTION TO EXTEND INJUNCTION

This second phase of the Route 7 litigation in Connecticut requires decision as to whether a proposed highway from Danbury to New Milford is a "Federal action" within the meaning of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), in which event the preparation of an environmental impact statement (EIS) is required. In the first phase of this litigation an unincorporated association of area residents obtained an injunction preventing construction of Route 7 between Norwalk and Danbury until federal officials had complied with NEPA by preparing an EIS "covering at least a span from Norwalk to Danbury." Committee to Stop Route 7 v. Volpe, 346 F.Supp. 731, 742 (D. Conn. 1972).[1/]

An incorporated and renamed association of area residents, which is successor in interest to one of the original plaintiffs, has now moved to extend the scope of the original injunction to bar construction between Danbury and

New Milford until adequate compliance with NEPA. The motion was precipitated by the state defendants advertisement of bids for construction of projects 34-124 and 18-93 in the Towns of Danbury and Brookfield. These projects are to be part of relocated Route 7 north of Danbury. Plaintiffs urge that the portion of relocated Route 7 from Danbury to New Mildord is a "Federal action" within the meaning of NEPA because of (a) federal funds already spent, (b) the State's eligibility for future federal funding, and (c) the relationship between the portion of relocated Route 7 north of Danbury and the portion south of Danbury, which all concede is a "Federal action."[2/] These contentions are appropriate for decision, whether the pending motion is considered solely as an effort to enlarge the prior injunction or as a new suit challenging the proposed new construction in an area not covered by the prior injunction. The state defendants oppose the motion primarily on the ground that the state proposes to use only state funds to construct the highway from Danbury to New Milford.

I.

Federal Funding

The principal federal funds relied on by plaintiff are those that have been used to construct a portion of I-84 in Danbury and a spur that connects I-84 to Route 7 north of Danbury. I-84 is a limited access expressway running in an east-west direction through Danbury. The state's plans call for reconstructing Route 7 to link up with I-84 from south of

Danbury at a point just west of Danbury and to continue north from I-84 at a point just east of Danbury. For the three miles between the two points where Route 7 will intersect I-84, the highway will be numbered both I-84 and U.S. 7. Approximately $40 million of federal funds was used for this portion of I-84.

The overlap of the two route designations does not mean that Route 7 north of Danbury is a federal highway for NEPA purposes. Congress has not purported to apply NEPA requirements to every highway that connects with a federally-funded highway, and the fact that the connection here involves a three-mile overlap makes no difference.

Plaintiffs direct more serious attention to the spur north of I-84, since this spur will be the southern terminus of the new Route 7 north of Danbury. Plaintiffs cite particularly $465,000 of "Federal-aid primary" money, 23 U.S.C. § 103(b), used to build a bridge at the northerly end of the spur. The spur is currently connected by two temporary ramps to the presently existing Route 7. State plans call for the removal of these ramps once the new Route 7 has been built from the spur northward. Once that occurs, cars travelling north from Danbury on new Route 7 will cross the federally-funded bridge and remain on the state-funded portion of new Route 7 for about one mile until the first exit is reached. Similarly cars coming south toward Danbury on new Route 7, after passing an exit one mile north of the

bridge, will have to cross the bridge and continue on into I-84. Plaintiffs' contention is that the portion of Route 7 that the state proposes to build north of Danbury does not merely intersect with a federally-funded highway, it becomes a federal highway because its southern end (the spur north of Danbury) is a federally-funded road.

Whether a state-funded road is nonetheless a federal road for NEPA purposes when it is merely one segment of a federal highway is an issue to be considered subsequently in this opinion. But no matter how strict an approach one takes to "segmenting," cf. Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir. 1971)(hereafter "San Antonio"), it is simply unrealistic to consider the 14.4-mile span from Danbury to New Milford to be a "segment" improperly broken off from the federally-funded spur of less than one-quarter of a mile.

Nor does it matter that the spur and the 14-mile span become a unit from which there is no exit along the southernmost mile. Most roads link up with other roads. When I-84 was constructed through Danbury, it was obviously necessary to construct a means of connecting that highway with existing Route 7. That is what the spur and the temporary ramps accomplish. They have a use entirely independent of any future use they might serve as the southern end of new Route 7 above Danbury. Once the state builds the

new Route 7 above Danbury, it is entitled to link up with the connection between I-84 and old Route 7, and neither this connection nor the elimination of the ramps to the replaced road federalizes the new state-funded road.[3/]

The only other federal funding indicated is a sum less than $50,000 of federal highway planning and research funds that were used in connection with the planning of the proposed road. The size of this expenditure and the totally preliminary purposes of the funds are too insignificant to render the proposed multi-million dollar highway a federal action.[4/] James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority, 359 F.Supp. 611, 634, 636, n. 72 (E.D. Va. 1973)(hereafter "James River").

II.

Eligibility for Federal Funding

More substantial is plaintiffs' claim that NEPA compliance is required because the portion of new Route 7 between Danbury and New Milford has been eligible for federal funding. State officials agree with plaintiffs that the conduct of corridor and design hearings were carried out pursuant to state requirements that are intended to be as rigorous as federal requirements. The purpose, explicitly acknowledged in the testimony of the state's deputy commissioner of transportation, is to preserve eligibility for federal funding, if anticipated state funds do not materialize.[5/] The state insists, however, that a decision

to rely on state funding for the Danbury-New Milford portion was made back in the 1960's and has been consistently adhered to. But the deputy commissioner agrees that even though state funds are to be used for the two projects of the Danbury-New Milford portion currently advertised for bids, the state remains eligible for federal funds to construct other projects within the Danbury-New Milford portion.[6/]

Plaintiffs' contention that eligibility for federal funding requires NEPA compliance draws support from three decisions, La Raza Unida v. Volpe, 337 F.Supp. 221 (N.D. Cal. 1971); Sierra Club v. Volpe, 351 F.Supp. 1002 (N.D. Cal. 1972), and James River, supra. La Raza Unida ruled that a highway becomes subject to "various federal statutes and regulations" at the point when location approval has been given by the Federal Highway Administration, see Policy and Procedures Memorandum (PPM) 20-8, whether or not the state has received or even sought any federal funds. While NEPA compliance was not explicitly adjudicated, 337 F.Supp. at 234, n. 8, the opinion emphasizes the importance of the environmental policies protected by NEPA and also by 23 U.S.C. § 138.

The two subsequent cases have cited La Raza Unida approvingly, although they had no occasion to apply its holding. Sierra Club v. Volpe, supra, is really a segmenting case, the court concluding that a 6.3-mile portion of highway connecting long portions of federally-funded highways on either side could not be isolated from compliance with NEPA.

The court also relied upon the state's disavowal of expected federal funding after the litigation had started. James River held that the challenged highway was not a federal highway, in part because there had been no federal location approval. Nevertheless the court explicitly endorsed La Raza Unida, warning that if a state could avoid NEPA compliance by foregoing federal funds though eligible for them after location approval, a state could ignore environmental considerations in precisely those instances where they may be most important. 359 F.Supp. at 633.

Both the state and federal defendants here seek to avoid the import of La Raza Unida because of the fact that the state never sought nor received location approval from the FHWA for new Route 7 north of Danbury. However, there has occurred a federal approval of no less significance. Since Route 7 is part of the federal-aid primary system, the state was required to obtain federal approval of the general route to be followed by the reconstruction of Route 7. In the lexicon of federal highwayese this is known as "route revision." It was sought on November 28, 1969 (Pl. Ex. QQ) and granted on December 22, 1969 (Pl. Ex. RR).

The state defendants minimize the significance of this route revision approval. They contend that federal review of a proposed change in a federal-aid primary route "is only to determine if the highway system will retain its coordinated nature." However, Angelo Siccardi, the FHWA's division engineer, testified that the route revision approval

is not only sufficient to constitute location approval within the meaning of PPM 20-8, but in fact the submission required to obtain route revision approval is more detailed than that required to obtain location approval. Moreover, both the federal and state defendants agree that projects on the Danbury-New Milford span not yet advertised for bid remain eligible for federal funding. That could be so only if the design public hearing that was held in conformity with federal requirements was preceded by location approval. See PPM 20-8(4)(b)(1).

Arguably a difference between "route revision" approval and location approval can be found in the likely attitude of state officials at the time each is sought. Application for "route revision" approval simply implies that the state wants to insure its eligibility for federal furding. By seeking location approval, however, the state manifests at least a tentative decision to seek federal funding. However, neither step commits the state to build the highway at all, nor to use federal funds if the highway is built, and surely neither step commits the federal agency to supply federal funds. Moreover, determination of whether the federal government is sufficiently involved in a highway to make it a "Federal action" within the meaning of NEPA should not depend on the state of mind of a potential state applicant for funds.

Thus the issue must be faced as to whether NEPA compliance is required for a span of a relocated highway that

has received FHWA approval to remain on the federal-aid primary system when state highway officials have taken all steps necessary to remain eligible for federal funding but have elected to use only state funds for construction. Though recognizing the force of the argument developed in La Raza Unida, this Court concludes that while Congress no doubt has power to require NEPA compliance in such circumstances, the existing legislation simply does not do so.

The argument in La Raza Unida, as echoed in James River, is that if NEPA does not apply to highways that are eligible for federal funding, state officials will retain the discretion to decide at any time prior to construction whether to subject themselves to NEPA requirements. Since they need not elect to take federal funds until the end of the planning and design process, they can retain the option of foregoing federal funds if NEPA compliance appears onerous. Moreover, they do not lose federal money, since these funds are invariably reallocated to other federal-aid highways within the state.

The contentions are all sound, but with deference I do not understand how they establish that such an option on the part of a state constitutes the highway a "Federal action" within the meaning of NEPA. Solicitude for the environment cannot substitute for legislation. Congress has not applied NEPA to all highways that the states are eligible to fund with federal dollars. There is no indication in this

case that the FHWA has in any way induced Connecticut to reconstruct Route 7 between Danbury and New Milford. The "route revision" approval leaves the State entirely free to proceed with the reconstruction or forego it entirely.[7/]

The State's option to use federal dollars, though open virtually until the concrete is poured, is nonetheless an option, and the State's choice should not be restricted simply because one alternative of the option (using state dollars) might result in less adequate assessment of environmental considerations. If the highway is not a federal action, then a state's decision to avoid federal involvement cannot have the paradoxical effect of establishing federal involvement. Cases may arise where a state has developed such a partnership with the federal government in the joint decision-making as to whether and where to build a highway that a last-minute state election to use state money for construction cannot be permitted to erase the federal imprimatur already placed on the project. See San Antonio, supra, 446 F.2d at 1027. But that has not occurred here. "Route revision" approval plus continued conformity by state highway officials with federal requirements to preserve eligibility for federal funding is not sufficient to constitute a state-funded highway as a "Federal action" within the meaning of NEPA.

III.

Segmenting

Though not a "Federal action" in and of itself, the

Danbury-New Milford portion of new Route 7 would be subject to NEPA requirements if it is an integral part of a "Federal action" to build a highway from Norwalk to New Milford. Plaintiffs insist this is precisely the case.

There is no doubt that the state plans to build a four-lane limited access expressway from Norwalk to New Milford. The Connecticut General Assembly authorized the planning for such a highway in 1957 and has since authorized what highway officials hope will be sufficient bonding authority. From the state's perspective it is one highway. But the state's intention, though relevant, does not determine federal consequences. The issue is whether the portion of new Route 7 between Danbury and New Milford has independent justification or whether construction of this span is dependent upon construction of the entire highway. See San Antonio, supra; Arlington Coalition v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Sierra Club v. Volpe, supra; James River, supra.

Plaintiffs rely essentially on the many documents whereby the state highway officials expressed their intention to build a highway from Norwalk to New Milford. The state defendants rely on evidence that most of the traffic on the Danbury-New Milford portion will originate and terminate in these or intermediate towns. The federal defendants, though explicitly invited to express a view with respect to the administration of important federal statutes, have said only that this is a matter for the Court's decision.

There seems little doubt that until the enactment of NEPA and particularly the injunction issued in this litigation, the state highway officials made no particular distinction between new Route 7 south and north of Danbury. To the extent the highway was thought of in two parts, the dividing line was a point near Silvermine Road in Brookfield, north of Danbury. This apparently stemmed from the fact that the state legislature authorized bonding in two stages, and the first stage reached from Norwalk only to this point in Brookfield. See Conn. Gen. Stat. § 13a-185(b)(6).

Nevertheless, the demographic and traffic aspects provide sufficient independent justification for the Danbury-New Milford portion. The populations of Danbury and New Milford are 53,300 and 15,400, respectively. They are the principal population centers in the area in which each town is located. State highway officials believe the traffic between these communities, and between each of them and points along the Danbury-New Milford portion, justifies the construction of an expressway linking the towns. The manager of design for the Connecticut Department of Transportation testified that the Danbury-New Milford portion should be built whether or not the Norwalk-Danbury portion was built. That view may be debated, but ultimate decision on the point is not for this Court. It is sufficient that the independent justification for the Danbury-New Milford portion is reasonable and not a sham rationalization.

It is true, as plaintiffs contend, that construction of the portion north of Danbury will provide additional reason for construction of the portion south of Danbury. But as long as the northern portion has sufficient independent justification, it cannot be considered an indivisible part of a single highway, simply because its existence increases the likelihood of building the southern portion. Again, this factor may be relevant, but it is not decisive. Construction of the Danbury-New Milford portion without NEPA compliance is not an impermissible segmenting of the Norwalk-New Milford reconstruction of Route 7.

Though not specifically urged by plaintiffs, it might be appropriate in some cases to reach a conclusion of "Federal action" based on the cumulative effect of the various factors considered in this opinion. The federal dollars to build the spur that will connect new Route 7 to I-84 and the small amount of highway planning and research funds, the "route revision" approval by the FHWA and the state's continued eligibility for federal funding for later projects north of Danbury, and the relationship between the Danbury-New Milford portion and the Norwalk-Danbury portion may well be considered to have a greater total effect than any factor alone. The case law in this developing field has not identified with clarity the standard agaiast which such a combination of factors is to be measured. Though the question on these facts is close, it does not appear that the federal

government has played a sufficient role in the reconstruction of highway between Danbury and New Milford to make this portion of Route 7 a "Federal action" within the meaning of NEPA. The preparation of an overall EIS for "the entire Route 7 corridor" has already been ordered. Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 362 F.Supp. 627, 638 (D. Vt. 1973). Since the Danbury-New Milford portion is deemed not to be a "Federal action," an EIS for this specific portion need not be prepared prior to construction of the projects challenged by this motion to extend the prior injunction. Accordingly, that motion is denied.[8/]

Dated at Hartford, Connecticut, this 10 day of May, 1974.

Jon O. Newman
United States District Judge

FOOTNOTES

1/ The injunction barred steps to construct "any portion of relocated Route 7." 346 F.Supp. at 742. That injunction was issued in the context of a suit challenging the proposed construction of two projects located between Norwalk and Danbury, projects 161-86 and 161-93. Subsequently the state defendants sought to amend the judgment to specify that construction between Danbury and New Milford would not require an EIS if only state funds were used. This Court declined to amend the judgment, considering that issue "not ripe for adjudication." Ruling on Motions to Amend Judgment p. 5 (Sept. 5, 1972). The ruling emphasized that determination of an appropriate span to be covered by an EIS should be made after submission of the EIS deemed sufficient by the appropriate agency with opportunity to review the agency's justification for the length of highway it has elected to consider.

In retrospect, it appears that two distinct issues were not adequately separated. The first is whether the EIS required before construction of Route 7 between Norwalk and Danbury need cover only that span or must also cover the entire span from Norwalk to New Milford. The second is whether there can be construction between Danbury and New Milford without preparation of an EIS for this span. Though the two questions are somewhat related, their resolution does not turn on identical factors. The first issue

will come before this Court when defendants seek to vacate a present injunction on the ground that an adequate EIS has been prepared. The second issue is squarely raised by the present controversy between the parties and requires adjudication now.

All parties appear to have assumed, correctly, that the original injunction, as clarified (?) by the subsequent Ruling on Motions to Amend Judgment, barred construction of relocated Route 7 between Norwalk and Danbury and did not resolve the issue now pending concerning construction between Danbury and New Milford.

2/ The portion south of Danbury, if built, is to be financed with federal funds. The issue in the first phase of this litigation was whether NEPA applied to a federally financed highway that had somewhat progressed through the planning stage prior to the effective date of NEPA.

3/ This is not to suggest that the construction of the spur is entirely lacking in NEPA significance. If NEPA had been in effect when the spur was built, an adequate EIS for I-84 would have had to give sufficient consideration to the environmental consequences of the spur, since it could be expected to fix with virtual certainty the southern terminus of any reconstruction of Route 7 north of Danbury.

4/ The two projects currently advertised for bids are estimated to cost $38 million in state funds.

5/ Apparently the state defendants concede that the advertisement for bids on projects 34-124 and 18-95 without prior federal approval of plans, specifications and engineering, renders these projects no longer eligible for federal funding.

6/ Should the state ultimately seek federal funding for other projects between Danbury and New Milford, it may encounter the objection that NEPA compliance has been rendered impossible by state construction of state-funded projects in the absence of an EIS. If at that point an EIS covering only the remaining projects could not realistically assess the pros and cons of building a highway whose completion and location are already predestined by the existing construction, then federal funding may not be permissible. Apparently the state prefers not to avoid that serious risk by insuring compliance with NEPA now.

7/ No claim has been made that "route revision" approval is itself a "major Federal action" within the meaning of 42 U.S.C. § 4332(2)(C) requiring a prior EIS, even if in this case such approval had occurred after the effective date of NEPA.

8/ The Court declines to adjudicate the pendent claim of non-compliance with Governor Meskill's Executive Order No. 16. Neither this order, nor the recent state legislation, which the state defendants allege has superseded the executive order, Public Act 73-562, have been given any

authoritative state court interpretation, and it would be most inappropriate for a federal court to adjudicate the effect of a governor's executive order in light of subsequent state legislation. Cf. James River, supra, 359 F.Supp. at 623.

Supreme Court, U. S.
F I L E D
SEP 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-255

CITIZENS FOR BALANCED ENVIRONMENT AND TRANSPORTATION, INC., Successor in Interest of Committee to Stop Route 7, et al, *Petitioners*

v.

JOHN A. VOLPE, et al, *Respondents*

STATE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The State defendants (Respondents) in the above-entitled action oppose the granting of the petitioners' request for review of this case by the United States Supreme Court. The State defendants in this action are the Commissioner of the Department of Transportation and the Deputy Commissioner of Transportation, Bureau of Highways, of the State of Connecticut.

RELATED CASE

This case involves a controversy over the proposed construction of 4.7 miles of relocated U.S. Route 7 between the City of Danbury and the Town of New Milford in the State of Connecticut. Construction of Route 7 in Connecticut from Norwalk to Danbury has been halted during the first phase of

Route 7 litigation by an injunction ordered by Judge Newman on July 7, 1972, *Committee to Stop Route* 7 v. *Volpe*, 346 F. Supp. 731 (Conn. 1972). Said injunction has continued without interruption from that date up to the present moment. This case arose when Judge Newman denied the plaintiffs' "Motion to Extend the Geographical Scope of Injunction" on May 10, 1974.

Contrary to the petitioners' claims, the issues in this case are not related to the issues in *Coleman* v. *The Conservation Society of Southern Vermont*, No. 74-1413, (so cited on page 2 of Petition), wherein a petition for a writ of certiorari has been filed by the Solicitor General on behalf of the United States. The decisions of the Second Circuit in these two cases are not in conflict and require no reconciliation. Certiorari should not be granted in this case which should not be considered jointly with *Coleman*.

QUESTIONS PRESENTED

The questions presented in this case are:

1. Whether the facts considered and found by the U.S. District Court (Newman, J.) were sufficient to support the court's conclusion that the Danbury-New Milford construction project under attack was not a "Federal action" within the meaning of NEPA and therefore an EIS for this specific portion need not be prepared prior to construction, when the court found that:

(a) the portion of new Route 7 between Danbury and New Milford has been eligible for federal funding (Petition 18a);

(b) eligibility for federal funding was preserved by the state officials who conducted corridor and design hearings pursuant to state requirements as rigorous as federal requirements, (P. 18a);

(c) less than $50,000 in federal funds were used in connection with the preliminary research and planning of the proposed road, (P. 18a);

(d) the proposed span of relocated highway has received FHWA approval to remain on the federal-aid primary system;

(e) the state highway officials elected to use only state funds for construction, (P. 21a, 22a);

(f) the proposed span has independent justification and is not dependent upon construction of the entire highway (P. 24a, 25a), and cannot be considered an indivisible part of a single highway, (P. 26a).

2. Whether the majority of the court below erred in deciding this case independently of *Coleman* v. *Conservation Society*, and

3. Whether the majority of the court below erred in affirming the decision of the Connecticut district court.

STATEMENT OF THE CASE

1. Route 7 before Relocation.

For many years prior to 1962, there existed a transportation corridor within the city of Danbury containing state routes No. 7, No. 6 and No. 202. In 1962 in order to provide an improved transportation system and to minimize the impact of this overlap construction on the Danbury city area, Route I-84 was constructed embracing for a distance of approximately 2.9 miles (Tr. p. 253) the same transportation corridor, (Tr. p. 164). In 1962, Route I-84 was constructed and completed with participating federal funds. As part of the same I-84 construction in 1962, two bridges, a stub end of Route 7 and ramp connections were built, (Tr. 69). This construction provided a connection to the then existing Route 7 and anticipated a

possible reconstruction of Route 7 so that if it were to be ultimately reconstructed, further disruption of traffic on the I-84 corridor would not be necessary, (Tr. p. 62).

2. Relocation of Route 7.

In 1959 or 1961, the General Assembly directed the Connecticut Highway Department to study the need for reconstruction of Route 7 from Norwalk to the Massachusetts state line. This study was done in 1962 and reported back to the General Assembly in 1963 (Tr. 255). The traffic study by the state in 1962 indicated no need to reconstruct the existing Route 7 in its entirety north of New Milford, (Tr. p. 255). This decision has remained unchanged since then due to a constant low traffic volume observed and counted at the Kent control station on Route 7 since 1964 to this day, (Tr. 181, 256). The traffic study further indicated a need for a length of highway connecting Norwalk and Danbury.

The major justification for the Danbury-New Milford highway project was found to be in its service to local needs of traffic flow within the urban and town areas. The next greatest need was found to be a semi-local service, i.e. traffic flowing from outside the city or town area to inside the city or town area, (Tr. 172-174). The least important need was for vehicular traffic utilizing the entire length of corridor in one trip. If the highway from Norwalk to Danbury were relocated or not built at all, a separate need would still exist for the construction of Route 7 from Danbury to New Milford, (Tr. 169-170, 174). The same would be true as to the Norwalk to Danbury segment if the Danbury to New Milford segment could not or would not be built, (Tr. 172-174).

3. Federal participation.

The two specific projects between Danbury and New Milford under attack by the petitioners, namely 34-124 and

18-95, were initiated by the Connecticut Highway Department in 1965, (Tr. 239). The state highway department did not then and the Connecticut Department of Transportation (CONNDOT) does not now intend to use federal aid funds on these projects, (Tr. 211, 238, 265, Defs. Exh. 76). The Route I-84 hookup with Route 7 constructed in 1962-1963 was so constructed essentially as part of I-84. It connected I-84 with the existing Route 7 northward and was made compatible with a proposed relocated Route 7.

The only federal funds ever used by the state on the projects in question were highway planning and research funds. The use of such funds by CONNDOT for this portion of Route 7 is wholly consistent with the state's resolution to seek no federal funding on the highway project itself, (Lamm Affidavit).

CONNDOT had been following a pattern of procedure with all state projects which satisfied the requirement of eligibility for federal funding. CONNDOT followed this same pattern of procedure for the construction of the project here under attack, (Tr. 211). This was a unilateral observance by the State of Connecticut of hearing requirements which mirror federal requirements, for whatever purpose, without a reciprocal federal commitment in the form of some approval, (Lamm Affidavit).

As a condition to federal funding, program approval is required by 23 U.S.C. § 105 and 23 C.F.R. § 1.8. CONNDOT has never requested FHWA to program any portion of Route 7 north of the I-84 interchange for federal funding, except for the use of federal planning and research funds and federal funds contributed to the construction of I-84, (Siccardi Affidavit).

Construction work is now in progress for the portion of expressway from Danbury to New Milford and has passed the

halfway mark of completion. The physical changes in the natural environment which already resulted from the road construction and Still River relocation are an accomplished fact and cannot be restored.

PRIOR PROCEEDINGS

The petition sets forth the prior proceedings (P. 10) in the order in which they occurred. However, we do not agree with the conclusions derived therefrom and set forth by the petitioners nor with their characterization that the proposed Danbury-New Milford project is a "fragment" of the project from Norwalk to Danbury, (P. 11).

Petitioners assert (P. 14-15) that neither the majority of the Court of Appeals nor Judge Newman made a finding "that the 4.7 mile Danbury-to-Brookfield leg of the expressway has any independent utility so as to justify its isolation for NEPA purposes." This assertion is not correct since Judge Newman explained at length in his decision (P. 23a-26a) the independent utility of this portion of Route 7 and concluded from the facts found by him that there was an "independent justification for the Danbury-New Milford portion." (P. 25a)

As stated by Judge Newman in his "Memorandum of Decision on Plaintiffs' Motion to Extend Injunction", (P. 14a), this case represents the "second phase of the Route 7 litigation in Connecticut requiring decision as to whether a proposed highway from Danbury to New Milford is a "Federal action" within the meaning of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), in which event the preparation of an environmental impact statement (EIS) is required." In the first phase of this litigation, Judge Newman directed that "judgment will enter for the plaintiffs declaring that relocated Route 7 requires the preparation of an environmental impact statement by federal officials covering at least a span from Norwalk to Danbury, and enjoining defendants, their

agents and employees and those persons in active concert or participation with them from taking any steps to construct any portion of relocated Route 7 until such a statement has been prepared according to the provisions of § 102(2)(C) of the National Environmental Policy Act." *Committee to Stop Route 7, et al* v. *John A. Volpe, et al*, 346 F. Supp. 731 at 742 (1972).

In this case, Judge Newman's decision came after all parties presented their evidence during a full hearing upon the merits. His thorough decision detailed the findings of fact and conclusions of law reached by the Court in declaring that the proposed highway from Danbury to New Milford is deemed not to be a "Federal action" and that "an EIS for this specific portion need not be prepared prior to construction of the projects challenged by this motion to extend the prior injunction." *Citizens for Balanced Environment and Transportation, Inc., successor in interest of Committee to Stop Route 7, et al* v. *John Volpe, et al*, 376 F. Supp. 806, 814 (1974) (P. 27a). It is to be noted that Judge Newman here indicated in his decision that he was fully aware of the order entered by Judge Oakes for "preparation of an overall EIS for the entire Route 7 corridor", in *Conservation Society of Southern Vermont Inc.*, v. *Secretary of Transportation*, 362 F. Supp. 627, 638 (D. Vt. 1973).

ARGUMENT

I.

THE SECOND CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH THE DECISIONS IN OTHER CIRCUITS

Petitioners make a sweeping assertion that the Second Circuit's decision in this case conflicts with holdings in the Fourth, Fifth, Eighth and Ninth Circuits, (P. 16), and refer to

specific cases.[1] An examination of these cases reveals there is no merit to this assertion as each case cited in the petition can readily be distinguished from this case.[2]

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[1] *La Raza Unida* v. *Volpe*, 337 F. Supp. 221, aff'd 488, F. 2d 559, 562 (9th Cir. 1975), *cert. den.*, 417 U.S. 968 c.f., *Lathan* v. *Volpe*, 455 F. 2d 1111 (9th Cir. 1971).

Named Individual Members of the San Antonio Conservation Soviety v. *Texas Hy. Dpt.*, 446 F. 2d 1013 (5th Cir. 1971)

Indian Lookout Alliance v. *Volpe*, 484 F. 2d 11 (8th Cir. 1974)

James River v. *Richmond Metropolitan Authority*, 359 F. Supp. 611, 628, 632, aff'd, 481 F. 2d 1280 (4th Cir. 1974)

[2] a) In *La Raza*, the district court did not decide the case upon the issue of NEPA non-compliance but upon the responsibilities imposed by the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, P.L. 91-646, 84 Stat. 1894; Section 502(3) of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 502(3); Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f); Section 138 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138, and all Federal regulations promulgated under each of said statutes. (Ibid p. 234)

However, the court considered NEPA's concern for the environment. The court ruled that "for the purpose of applying the various federal statutes and regulations, a federal-aid highway is any project for which the state has obtained location approval." (Ibid p. 227)

In our case "location approval" defined by *La Raza* and other cases was never requested or received by the State of Connecticut.

b) In *Named Individual Members of the San Antonio Conservation Society*, no environmental impact statement was prepared as required by NEPA although federal funding was allowed for two "end segments" which embraced the "third segment" containing parkland. The Circuit Court decided that such exclusion of the middle segment constituted non-compliance by the Secretary of Transportation with his statutory responsibilities under 23 U.S.C.A. § 138; 42 U.S.C.A. § 4332 and 49 U.S.C.A. § 1653(f).
The facts in our case are so dissimilar that *San Antonio* merits no further discussion.

c) In *Indian Lookout Alliance*, "location approval" was secured from the FHWA. For this reason, the court decided it "need not explore the earliest time NEPA becomes applicable" but must "resolve whether the scope extends to the whole system or the entire F-518 project." (Ibid p. 17) The court decided that the 14-mile segment of F-518-4 did not have the "requisite independent utility to be the appropriate segment to be covered by the Environmental Impact Statement", (Ibid p. 20).

In our case, no "location approval" was requested by the State of Connecticut and none was granted by the FHWA. Judge Newman found that the portion of highway from Danbury to New Milford had an independent justification and utility.

d) *James River* explained that the funds received by the State for planning and research "are apparently granted to help states fulfill the requirements of 23 U.S.C. §134 that any proposed highway within an urban area must be encompassed within a comprehensive transportation plan before federal funds can be allotted toward it. It by

In our case, the issues of federal funding, eligibility for federal funding and segmenting were carefully reviewed by Judge Newman as appears in his memorandum of decision, (P. 14a). The Second Circuit acknowledged Judge Newman's knowledge of the facts and correctness of his ultimate decision reached only after thorough evaluation by him of the facts and interpretation of the case law interpreting the application of NEPA.

II.

THE SECOND CIRCUIT IS NOT IN CONFLICT WITH ITSELF

The issue before Judge Newman was whether or not the Danbury-New Milford portion of the expressway was a "Federal action" within the meaning of NEPA. The issue before Judge Oakes in *Coleman* v. *Conservation Society* was the sufficiency of an EIS presented for purposes of dissolving the Route 7 injunction issued at an earlier date by the same court.

The Second Circuit entered the following statement in its decision in *Coleman* v. *Conservation Society* (508 F. 2d at 936, n. 43a):

> "In a recent per curiam opinion, this Circuit affirmed a district court determination relating to a portion of the

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no means follows, however, that every urban highway encompassed within a given plan will receive federal funds." (Ibid p. 628) The court attached no significance to the granting of such funds and concluded that upon the facts, federal statutory requirements need not be met prior to the construction of the project under attack as the plaintiffs failed to show sufficient federal involvement in the planning and construction of the Downtown Express, (Ibid p. 636).

Some of the facts in our case are parallel to the facts considered by the court in *James River*. Judge Newman cited *James River* in his memorandum of decision and concluded upon the facts found by him that the project under attack was not a "Federal action" within the meaning of NEPA. Judge Newman's final decision is in harmony with *James River* where as in our case, no "location approval" was requested or obtained from FHWA and only state funds are used for the project which received insignificant federal funds only for the purposes of planning and research.

Route 7 corridor between Danbury and New Milford, Connecticut. Citzens for Balanced Environment and Transportation, Inc. v. Volpe, slip op. 5449 (2d Cir. Sept. 16, 1974). In that case the district court dealt solely with the question of whether or not there was federal action in the construction of the Danbury-New Milford portion of Route 7; it did not consider the issue of the necessity for an EIS covering the entire corridor. Thus, the affirmance by this Court of Judge Newman's specific finding does not preclude, and is unaffected by, the present affirmance of Judge Oakes' general findings."

III.

THE STATUTORY SCHEME FOR FEDERALLY-AIDED HIGHWAYS

In response to this portion of the Petitioners' Argument, respondents wish to correct a misstatement of the facts appearing therein, (P. 19).

Contrary to the statement of the petitioners, "design approval" was never requested by the State of Connecticut and was never granted by the federal highway authorities for the portion of expressway between Danbury and New Milford. Furthermore, "location approval" too has not been requested by the State nor granted by the federal government for this portion of highway under attack by the petitioners.[3]

---

[3]These facts were presented to Judge Newman at the trial and were confirmed by the federal government in the affidavits of Lester P. Lamm, Assistant Federal Highway Administrator and Executive Director of the Federal Highway Administration and A. J. Siccardi, Division Engineer for the Connecticut Division of the Federal Highway Administration. These affidavits were presented to Judge Newman after the trial of this case at his request due to the non-participation of the federal defendants in this part of the proceedings.

IV.

THE SEGMENTATION ISSUE

In their argument, petitioners are in search of a formula which magically will contain all the ingredients of a balanced equation which will contain no error in establishing that a particular state project is but a "segment" of a "major federal action".

The cases which have discussed this "project splitting" theory analyze two factors:

a) The independent justification for the project, and b) the degree to which the Federal and State governments have formed a "partnership" prior to segmentation.

The first factor is a factual determination. In *James River*, supra, the court said "In order to determine, therefore, when a group of segments should be classified as a single project for purposes of federal law, a court must look to a multitude of factors, including the manner in which the roads were planned, their geographical locations and the utility of each in the absence of the other." (359 F. Supp. p. 611 at 635).

The project before this Court has always been treated as a separate independent project with its own independent justification and utility. Judge Newman found from all the evidence that "independent justification for the Danbury-New Milford portion is reasonable and not a sham for rationalization." (P. 25a)

The most important factor distinguishing the project in question from all the cases holding a State project to be a "Federal action" where Federal funds have not been committed is the absence of the Federal-State partnership. The justification for the eligibility theory of *La Raza Unida* cases and the segmentation theory of the *San Antonio* cases is that

once embarked upon a Federal project a state should not be able to reverse itself in order to avoid Federal procedures and regulations. Since the intention to seek Federal funds is a difficult fact to prove, the courts have resorted to such factors as location approval, independent justification and Federal-State cooperation to make that determination the crucial factor.

The elements of the Federal-State partnership are absent in our case. Relocated Route 7 from Danbury to New Milford was planned as an independent state-funded project. It was joined with other portions of relocated Routes 7 and I-84 for convenience. There was no evidence presented to show that it was joined with such other projects for the purpose of obtaining or benefiting from federal funds. When the portion of relocated Route 7 from Norwalk to Danbury was enjoined by Judge Newman, the Danbury-New Milford project was set apart not to avoid NEPA or other Federal regulations, but because over the years, it was always planned as a separate state-funded project and needed to be constructed whether or not the remainder of relocated Route 7 was ever built south of Danbury, (Tr. pp. 169-170, 174). The same would be true as to the Norwalk to Danbury portion if the Danbury to New Milford project could not or would not be built, (Tr. pp. 172-4).

Judge Newman was satisfied that the evidence failed to demonstrate a federal-state partnership in the project from Danbury to New Milford. The express denial of such partnership voiced in the affidavit of Lester P. Lamm, Assistant Federal Highway Administrator and Executive Director of the Federal Highway Administration, cannot be dismissed and swept aside as valueless in establishing this key factor.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
SEP 18 1975
MICHAEL RODAK, JR., CLERK

No. 75-255

In the Supreme Court of the United States

OCTOBER TERM, 1975

CITIZENS FOR BALANCED ENVIRONMENT AND TRANSPORTATION, INC., ET AL., PETITIONERS

v.

WILLIAM T. COLEMAN, JR., SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners claim that an environmental impact statement should have been issued prior to the construction of 4.7 miles of highway that are being built by a state agency using state resources.

Since 1957, the State of Connecticut has been making plans to relocate and rebuild the portion of Route 7 between Norwalk and New Milford, a distance of 31 miles.[1] Anticipating that the federal government would assume approximately half of the cost of this construction, state officials submitted their plans to the Federal Highway Administration, at appropriate stages of the development,

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[1]The State has no plan calling for relocation and rebuilding of the highway north of New Milford.

for federal approval. During this process, a location hearing was held in 1964 and a design hearing was held in 1969.

The National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321 *et seq.* (NEPA) became effective on January 1, 1970, four days before federal officials approved acquisition financing for some portions of the proposed construction, and three months before final design approval was given for another portion.

Petitioners and others brought suit, contending that construction on Route 7 should be enjoined until an environmental impact statement discussing the effects of the proposed construction had been prepared. The district court issued an injunction, but only with respect to the portion of the highway running south from Danbury to Norwalk, in which the approval process had progressed to the design approval stage. *Committee to Stop Route 7 v. Volpe,* 346 F. Supp. 731 (D. Conn.). Federal officials, in cooperation with state officials, began to prepare an environmental impact statement for that segment; the statement has been in preparation for three years and has not been issued in final form. The Danbury to Norwalk segment remains subject to the injunction.

The State of Connecticut, believing that the 4.7 miles of highway north of Danbury (the Danbury-Brookfield segment) was important to State transportation needs,[2] decided to abandon their quest for federal assistance for the building of that segment and to commence construction using its own resources. Petitioners returned to the district court seeking to have the initial injunction enlarged to forbid construction of this segment as well. The court declined to enlarge the injunction or to issue a new injunction, concluding that, because the State is not relying upon federal funds to construct the segment, there is no

[2]The Danbury-Brookfield segment intersects with I-84, an important east-west highway completed in 1963.

major federal action requiring an impact statement (Pet. App. 14a-27a; 376 F. Supp. 806). The court of appeals affirmed (Pet. App. 1a-13a; 503 F.2d 601). The Danbury-Brookfield segment is under construction and more than 50 percent completed; the Federal Highway Administration estimates that the segment will be in service by November 1976.

1. Section 102(2) of NEPA, 42 U.S.C. 4332(2), provides that "all agencies of the Federal Government shall * * * include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement" on the environmental consequences of and alternatives to the proposed action.

Section 102(2) is thus addressed to "all agencies of the Federal Government" and since the State highway authorities are not an "agenc[y] of the Federal Government," they are not bound by the requirements of Section 102(2)(C) relating to impact statements. Petitioners' contention, which we discuss below, that the construction of the Danbury-Brookfield segment is "major Federal action" even though the State is building the segment without federal funds, overlooks the fact that an impact statement is not required in this case because those who propose to build and finance the building of the highway are not "federal agencies."

To be sure, two of the defendants are "federal agencies," and an injunction issued by the district court could run against them. The Department of Transportation and the Federal Highway Administration could, if Section 102(2)(C) requires an impact statement, be told that they must desist from further participation in this highway project until an impact statement has been prepared. However, because the State is proceeding on its own to construct the Danbury-Brookfield segment, nothing the two fed-

eral agencies could stop doing would be of any use to petitioners. The injunction they seek must run against the State officials and, as we have argued, they cannot obtain such an injunction because the State officials are not the "federal agencies" to which NEPA is addressed.

2. This Court pointed out in *Aberdeen & Rockfish R.R.* v. *SCRAP*, No. 73-1966, decided June 24, 1975 (*SCRAP II*) that "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action" (slip op. at 26; emphasis in original). Here the State officials do not have any proposal for federal action pending before the Federal Highway Administration, nor is the Administration preparing to make a recommendation or report with respect to the Danbury-Brookfield segment. The State is proceeding with construction without obtaining either federal approval or federal funds, and there is, therefore, no need for an impact statement even if a relevant "federal agency were involved and even if the construction were "major Federal action."

3. We turn to petitioners' central argument—that construction of the segment is "major Federal action." We submit that the concept of "major Federal action" does not include "action" no more extensive than, as here, participation in the formative stages of a project now entirely under state control. Although there are several cases, to which petitioners refer, holding that "major Federal action" in the highway planning and approval process takes place before federal funds are finally committed, we know of no case holding that there is such "action" when federal funds not only are not committed, but also are not contemplated to be committed. The Seventh Circuit has comprehensively analyzed a similar claim,

concluding (*City of Highland Park, Illinois* v. *Train*, No. 74-1271, decided June 10, 1975, slip op. 21-22; footnotes omitted):

> One case sustained a preliminary injunction against construction of a highway project for failure to comply with a federal location statute, holding that the project for a part of the federal-aid primary system became a federal-aid highway project for purposes of that statute when it received location approval prior to any application for federal funds. *La Raza Unida* v. *Volpe*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). That case was not decided under NEPA, which applies to proposed major federal actions and not to a federal-aid secondary designation that took place long before NEPA was adopted or to possible federal funding that is not proposed at present. And, as the district court in *River v. Richmond Metropolitan Authority*, [359 F. Supp. 611 (E.D. Va. 1973)] stated: "Notwithstanding the fact that *La Raza Unida* declared a highway project to be federal early in the planning process, it most assuredly did not hold that a project could be federal where no federal participation had ever taken place." 359 F. Supp. at 634. Possible future federal funding is all that the plaintiffs in the case at bar have shown.

The Lake-Cook Road improvement appears from the summary judgment papers to be a state project on which no federal action is proposed, and therefore, NEPA's requirement of an environmental impact statement does not apply to the project. See *Citizens for Balanced Environment and Transportation, Inc. v. Volpe*, 503 F.2d 601 (2d Cir. 1974); *Civic Improvement Committee v. Volpe*, 459 F.2d 957 (4th Cir. 1972); *cf. Bradford Township v. Illinois State Toll Highway Authority*, 463 F.2d 537, 540 (7th Cir. 1972), *cert. denied*, 409 U.S. 1047 (1972).

To the extent petitioners are arguing that an impact statement cannot routinely be delayed until federal spending is about to begin, we agree. NEPA requires the impact statement to accompany the "recommendation or report on a *proposal* for federal action" (*SCRAP II, supra*, slip op. at 26); the recommendation or report will, perforce, precede the expenditure of funds. But it is the nature of the *proposal* that sets the bounds of the federal action. If no major federal action is proposed, no impact statement is required. In this case no major federal action—the expenditure of federal funds—has been proposed, and therefore an impact statement is not required.

4. Petitioners contend (Pet. 16) that there is a conflict among the circuits and between panels of the Second Circuit. We submit, however, that for the reasons discussed in Paragraph 3, *supra,* there is no conflict among the circuits on the nature of "major Federal action." The cases upon which petitioners rely deal with proposals for federal action, and the question presented in them is one of timing: how near at hand must the proposed federal action be before an impact statement must accompany a recommendation or report? In this case, however, there is no federal action in prospect, either in the long run or the short run, with respect to the Danbury-Brookfield segment.

Petitioners' alternative contention that two panels of the Second Circuit are in conflict is not a ground upon which to seek certiorari. If there were a conflict between two decisions of the same court, it would be for that court to resolve. *Wisniewski* v. *United States,* 353 U.S. 901, 902.

5. Nor is there a conflict between the instant decision and the decision in *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation,* 508 F.2d 927 (C.A. 2), petition for a writ of certiorari pending *sub nom. Coleman* v. *The Conservation Society of Southern*

Vermont, Inc., No. 74-1413. The problems presented by the two cases are analytically distinct, and there is no need to consolidate them for disposition here or to hold the instant case pending disposition of *Conservation Society*. The *Conservation Society* court held that the Federal Highway Administration must prepare an environmental impact statement assessing the effects of building a superhighway through the entire 280 mile "Route 7 corridor." We have argued that this decision is incorrect and should be reversed. Even if it is correct, however, it holds only that there must be an "overall" assessment of the effects of a continuous highway through the corridor. This "overall' assessment can be provided without regard to the presence or absence of an impact statement for each short segment of the whole project. The *Conservation Society* court held that state officials have been contemplating federal action. That federal action, if it exists,[3] pertains to the corridor as a whole, and not to any particular constituent segment. There is nothing inconsistent, therefore, between requiring an overall impact statement and not requiring a statement on the Danbury-Brookfield segment. As the *Conservation Society* court itself explained (508 F.2d at 936, n. 43a):

> In a recent per curiam opinion, this Circuit affirmed a district court determination relating to a portion of the Route 7 corridor between Danbury and New Milford, Connecticut. * * * In that case the district court dealt solely with the question of whether or not there was federal action in the construction of the Danbury-New Milford portion of Route 7; it did not consider the issue of the necessity for an EIS covering the entire corridor. Thus, the affirmance by this Court

[3]The district court in *Conservation Society* expressly held (362 F. Supp. 627, 636 (D. Vt.)) that "there is no overall federal plan for improvement of the route 7 corridor * * *."

of Judge Newman's specific finding does not preclude, and is unaffected by, the present affirmance of Judge Oakes' general findings.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.